Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-321

STENCEL AERO ENGINEERING CORPORATION,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 7, 1976
CERTIORARI GRANTED NOVEMBER 15, 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-321

STENCEL AERO ENGINEERING CORPORATION,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Docket Entries

DOCKET ENTRIES IN THE DISTRICT COURT OF THE EASTERN DISTRICT OF MISSOURI

Date	*Proceedings*
October 11, 1974	Complaint filed and Summons issued. Jury requested.
November 19, 1974	On motion, Defendant Stencel Aero Engineering Corporation granted until December 16, 1974 to move, answer or otherwise respond. All objections to process and venue reserved.
December 13, 1974	On motion, Defendant Stencel Aero Engineering Corporation granted until Monday, January 6, 1975 to move, answer or otherwise respond or object to jurisdiction, venue or service of process.
December 16, 1974	Answer filed by Defendant United States of America.
January 7, 1975	Answer and Cross-Claim of Stencel Aero Engineering Corporation filed.
January 9, 1975	Motion for Order Requiring Defendant United States of America to Preserve Tangible Evidence, and Suggestions in Support filed by Stencel Aero Engineering Corporation.
January 20, 1975	Motion for Summary Judgment against Plaintiff with Memorandum in Support and Attached Exhibits

Docket Entries

Date	*Proceedings*
	"A" and "B" of Defendant United States of America filed.
January 24, 1975	Motion of Defendant Stencel Aero Engineering Corporation filed January 9, 1975, granted.
February 10, 1975	First Supplemental Memorandum in Support of Motion for Summary Judgment against Plaintiff with Attached Exhibits A-4 and A-5 filed by Defendant United States of America.
March 7, 1975	Answer to Cross-Claim of Defendant Stencel Aero Engineering Corporation filed by Defendant United States of America.
March 13, 1975	Motion to Dismiss the Cross-Claim of Stencel Aero Engineering Corporation with attachments filed by Defendant United States of America.
March 14, 1975	By Leave of Court, Defendant Stencel Aero Engineering Corporation granted to and including March 27, 1975 in which to file suggestions in opposition to motion of Defendant United States of America to Dismiss Cross-Claim; Defendant Stencel Aero Engineering Corporation also requests Oral Argument on said Motion.
March 28, 1975	By Leave of Court, Defendant Stencel Aero Engineering Corporation granted to and including April 10, 1975 to

Docket Entries

Date	*Proceedings*
	file suggestions in opposition to Motion of United States of America to Dismiss Cross-Claim.
April 7, 1975	Memorandum in Opposition to Motion of United States of America to Dismiss Cross-Claim filed by Stencel Aero Engineering Corporation.
April 25, 1975	Supplemental Memorandum in Support of Motion to Dismiss the Cross-Claim of Defendant Stencel Aero Engineering Corporation filed by Defendant United States of America.
April 26, 1975	Motion of Defendant United States of America to Dismiss Cross-Claim of Defendant Stencel Aero Engineering Corporation argued and submitted.
May 15, 1975	Memorandum and Order sustaining the Motion of Defendant United States of America for Summary Judgment against the Plaintiff and further sustaining the Motion of Defendant United States of America to dismiss the Cross-Claim of Defendant Stencel Aero Engineering Corporation with prejudice.
May 20, 1975	Motion for Entry of Final Judgment pursuant to Federal Rule 54(b) with Memorandum in Support filed by Defendant Stencel Aero Engineering Corporation.

Docket Entries

Date	*Proceedings*
June 6, 1975	By Leave of Court First Amended Complaint filed by Plaintiff with Request for Issuance of Summons to Defendants Mills Manufacturing, Pioneer Parachute Company, Inc., Pioneer Recovery Systems, Inc., North American Rockwell Corporation, North American Rockwell, Rockwell International.
June 10, 1975	Notice of Appeal filed by Defendant Stencel Aero Engineering Corporation.
June 13, 1975	Answer of Stencel Aero Engineering Corporation to First Amended Complaint filed.
July 10, 1975	By Leave of Court, Defendant North American Rockwell Corporation and Rockwell International granted 30 days within which to plead.
August 11, 1975	Motion of Defendant Mills Manufacturing Corporation to Dismiss Counts III & IV as to Defendant Mills Manufacturing Corporation.
August 15, 1975	Separate Answer of Defendant Pioneer Recovery Systems to First Amended Complaint filed.
August 15, 1975	Separate Answer of Defendant Pioneer Parachute Company, Inc. to First Amended Complaint filed.

Docket Entries

Date	*Proceedings*
August 29, 1975	Answer of Defendant North American Rockwell to the First Amended Complaint filed.
October 7, 1975	Order entered granting Motion of Defendant Mills Manufacturing Corporation to Dismiss Counts III & IV of the First Amended Complaint.
March 11, 1976	By Leave of Court Second Amended Complaint filed by Plaintiff.
June 1, 1976	Answer of Defendant Pioneer Recovery Systems, Inc. to Plaintiff's Second Amended Complaint filed.
June 1, 1976	Separate Answer of Defendant Pioneer Parachute Company, Inc. to Plaintiff's Second Amended Complaint filed.
June 1, 1976	Answer of Defendant Stencel Aero Engineering Corporation to Plaintiff's Second Amended Complaint filed.
June 4, 1976	By Leave of Court, Answer of Defendants North American Rockwell Corporation, North American Rockwell and Rockwell International to Plaintiff's Second Amended Complaint filed.
June 9, 1976	First Amended Answer of Defendant Stencel Aero Engineering Corporation to Plaintiff's Second Amended Complaint filed.

Docket Entries

Date	*Proceedings*
July 29, 1976	Answer of Defendant Mills Manufacturing Corporation to Second Amended Complaint filed.
November 8, 1976	Second Amended Answer of Defendant Stencel Aero Engineering Corporation to Second Amended Complaint of Plaintiff filed.

DOCKET ENTRIES IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Date	*Proceedings*
July 17, 1975	Appeal docketed.
October 9, 1975	Appendix and Brief of Appellant Stencel Aero Engineering Corporation. Filed.
December 12, 1975	Brief of Appellee the United States of America filed.
December 19, 1975	Submitted to Screening Panel.
December 31, 1975	Order that Appellant Stencel Aero Engineering Corporation may have through January 13, 1976 to serve and file Reply Brief filed.
January 13, 1976	Reply Brief of Appellant Stencel Aero Engineering Corporation filed.
February 11, 1976	Argued and Submitted to Judges Gibson, Bright, Van Pelt. Thomas Whalen for Appellant Stencel Aero

Docket Entries

Date	*Proceedings*
	Engineering Corporation; Thomas Martin, Department of Justice for Appellee United States of America. Rebuttal by Mr. Whalen. Record.
June 4, 1976	Opinion by Judge Bright filed (Published).
June 4, 1976	Judgment: Order of District Court dismissing Stencel's Cross-Claim is affirmed. Filed.
June 14, 1976	Bill of Costs of Appellee United States of America filed.
June 29, 1976	Mandate Issued.
September 7, 1976	Notice of Filing of Petition for Writ of Certiorari in Supreme Court as Case No. 76-321.
November 15, 1976	Order of Supreme Court granting Certiorari in Case No. 76-321. Filed.

Complaint

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MISSOURI

Civil Action No. 74-711C(4)

JOHN C. DONHAM,

Plaintiff,

vs.

UNITED STATES OF AMERICA,
STENCIL AERO ENGINEERING CORPORATION,
and MILLS MANUFACTURING CORPORATION,

Defendants.

COUNT I

Comes now the plaintiff in the above captioned cause and for Count I of said petition, states and alleges:

1. The plaintiff is a citizen of the State of Missouri, presently residing at 720 Alice, Dexter, Missouri 63841.

2. That plaintiff has duly performed all of the requirements under Title 28 U. S. C. Chapter 171, Sections 2, 6, 7, 1 et seq.

3. The defendant, United States, may be served through the Honorable John L. McLucas, Secretary, Department of the United States Air Force, Pentagon, Washington, D. C. 20301. The defendant, Stencil Aero Engineering

Complaint

Corporation is a North Carolina corporation duly incorporated and existing under and by virtue of law and having its principle place of business and office and where service may be obtained at 18½ Church Street, Asheville, North Carolina, 28801. The defendant, Mills Manufacturing Corporation, is a New York corporation duly organized and existing under and by virtue of law and having its principle place of business and offices where service may be obtained at the Insurance Building, Raleigh, North Carolina 27602.

4. Jurisdiction arises under the Federal Tort Claims Act against the United States Government, and on negligence as to the other named defendants, and by reason of the fact that the amount in controversy exceeds Ten Thousand Dollars ($10,000.00) excluding interest and costs.

5. On or about the 9th day of June, 1973, plaintiff, an Air Reserve Force pilot, in an inactive duty for training status, assigned to the 110th Tactical Fighters Squadron, 131st Tactical Fighter Group, Missouri Air National Guard, Lambert International Airport, St. Louis, Missouri, while piloting an F-100D fighter aircraft, Serial No. 552947, in the aero space over the eastern sector of Missouri, was forced to eject from his aircraft, using his egress life support system which caused serious and permanent injury to the plaintiff as more specifically set forth herein.

6. Plaintiff further states that he was forced to use the defendant United States Air Force and the Defendant Corporation's egress life support system in a manner in which the system was intended to be used, and as a direct result of an inherent defect not known to the plaintiff,

plaintiff was thereby caused to sustain serious and permanent injuries as more specifically set forth herein.

7. Plaintiff further states that as a direct and proximate result of said malfunction of his egress life support system, precipitated by the negligence and carelessness of the defendants individually and jointly, plaintiff sustained serious and permanent and disabling injuries to his left arm, back, bones, joints, muscles, tendons, tissues, nerves, membranes, ligaments, cartilages, discs, and parts thereof were seriously bruised, contused, lacerated, torn, wrenched, swollen, twisted, weakened, strained, sprained, impinged, and inflamed; and plaintiff was caused to sustain a noncommitant rupture of the brachial plexus nerve member and all the surrounding nerves, muscles, tendons, tissues, membranes, nerve roots, blood vessels, and parts thereof of the left arm; and the total arm to and including the shoulder and all of its parts are completely and permanent impaired, diminished and made painful, and said form is unfunctional in nature, and the function and use of all said parts and organs are seriously and permanently and totally impaired.

8. Plaintiff further states that he has lost wages and income as a direct result of the carelessness and negligence of the defendants in the approximate sum of Ten Thousand Dollars ($10,000.00) to date, and will in the future, incur additional loss of income; as a direct and proximate result of said injuries, his earning capacity has been obliterated and reduced to such an extent that he shall be incapable of earning sufficient moneys with which to support himself and his family; and plaintiff has been caused to incur extensive and painful medical care, attention, treatment

and therapy, and will in the future, be required to incur additional medical care, attention, treatment and therapy; and plaintiff has been caused to be hospitalized, and will in the future, be caused to be hospitalized as a direct and proximate result of the negligence and carelessness of the defendants aforesaid.

9. Plaintiff further states that said injuries are of a total and permanent nature, and that he will for all time be permanently and totally disabled from performing any services in any gainful occupation on the open labor market commensurate with his station in life and ability, especially the occupations requiring the use of the left hand, wrist, elbow, shoulder, and total arm in aviation as a pilot or co-pilot; or any other related positions for which he may be qualified.

WHEREFORE, plaintiff John C. Donham prays judgment against the United States of America in the sum of Two Million Five Hundred Thousand Dollars ($2,500,000.00) together with his costs expended herein.

COUNT II

Again comes the plaintiff in the above captioned cause and for Count II of said petition, states and alleges:

1. The defendants Stencil Aero Engineering Corporation and Mills Manufacturing Corporation are corporations duly organized and existing under and by virtue of the law of the State of North Carolina and New York.

2. Plaintiff incorporates by reference each and every allegation contained in Paragraph No. 1 through No. 9 of Count I of said petition as if specifically pleaded.

Complaint

WHEREFORE, plaintiff prays judgment against the defendant, Stencil Aero Enginering Corporation and Mills Manufacturing Corporation in the sum of Two Million Five Hundred Thousand Dollars ($2,500,000.00).

Jury trial is hereby demanded as to all defendants.

Filed October 11, 1974

Answer of the United States

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

[Title Omitted in Printing]

Now comes defendant, United States of America, by and through its attorneys and in answer to the allegations contained in plaintiff's complaint, states and avers as follows:

Response to Count I

1. The allegations of paragraphs 2 and 4 of Count I of plaintiff's complaint are conclusions of law which require no answer and are referred to the Court for determination.

2. The United States denies the allegations of paragraphs 6 and 7 of Count I of plaintiff's complaint.

3. The United States denies the allegations of paragraphs 1, 8 and 9 of plaintiff's complaint for lack of information sufficient to form a belief as to their truth.

4. Responding to the allegations contained in paragraph 3 of Count I of plaintiff's complaint, the United States affirmatively asserts it may be served as provided by Federal Rule of Civil Procedure 4(d)4 and not as plaintiff asserts. All other allegations of paragraph 3 of Count I of plaintiff's complaint are denied for lack of information sufficient to form a belief as to their truth.

5. Responding to the allegations of paragraph 5 of Count I of plaintiff's complaint, the United States admits plaintiff was a member of the Missouri Air National

Guard on June 9, 1973 while piloting an F-100D aircraft while on inactive duty for training under the provisions of 32 U.S.C. §502. Responding further, the United States admits plaintiff ejected from his aircraft over the eastern sector of Missouri. All other allegations of paragraph 5 of Count I of plaintiff's complaint are denied.

Response to Count II

1. The United States denies the allegations of paragraph 1 of Count II of plaintiff's complaint for lack of information sufficient to form a belief as to their truth.

2. Responding to the allegations of paragraph 2 of Count II of plaintiff's complaint, the United States incorporates by reference each and every response contained in paragraphs 1 to 9 of Count I as is fully set out herein.

AFFIRMATIVE DEFENSES

1. Plaintiff's complaint fails to state a cause of action upon which relief can be granted against the United States.

2. Any liability that may exist for plaintiff's alleged injury lies in a third party, not the United States.

3. The provisions of 28 U.S.C. §2680(a) are applicable to this defendant.

4. The provisions of 28 U.S.C. §2680(h) are applicable to this defendant.

5. Plaintiff's ejection from the aircraft was made in connection with, subject to and with acceptance of the known risks and dangers of ejecting from the aircraft and

over which this defendant had no control; the plaintiff assumed, accepted and understood all said risks and dangers, of which he had actual or constructive knowledge; and plaintiff's alleged injuries arose out of and resulted from said risks and dangers.

6. Defendant, United States of America, denies that any negligent or wrongful act or omission on the part of any agent or representative of the United States caused or contributed to plaintiff's alleged injuuries.

7. Plaintiff's own negligence caused or contributed to the accident and the damages sued for herein.

Wherefore, defendant, United States of America, demands judgment dismissing the complaint herein, together with its costs and disbursements and for such other further and different relief which the Court may deem just and proper.

Filed
December 16, 1974

(Certificate of Service Omitted in Printing.)

Answer and Cross-Claim of Defendant Stencel Aero Engineering Corporation

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

[Title Omitted in Printing]

Comes now defendant Stencel Aero Engineering Corporation (incorrectly sued herein as Stencil Aero Engineering Corporation) and for its answer to the Complaint herein states as follows:

COUNT I

1. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 1 through 6 of Count I of the Complaint, inclusive except that defendant Stencel Aero Engineering Corporation admits that it is a corporation duly organized and existing under and by virtue of the laws of North Carolina and as such is a citizen of North Carolina, as alleged in paragraph 3, and defendant Stencel Aero Engineering Corporation further admits that the amount in controversy exceeds $10,000 exclusive of interest and costs as alleged in paragraph 4.

2. Defendant denies the allegations in paragraphs 7, 8 and 9 of Count I of the Complaint.

COUNT II

3. For answer to paragraph 1 of Count II of the Complaint, defendant admits that Stencel Aero Engineering

Answer and Cross-Claim of Defendant Stencel Aero Engineering Corporation

Corporation is a corporation duly organized and existing under and by virtue of the laws of the State of North Carolina. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in said paragraph.

4. For answer to paragraph 2 of Count II of the Complaint, defendant Stencel Aero Engineering Corporation repeats, realleges and incorporates herein by reference its answers to paragraphs 1 through 9 of Count I of the Complaint set forth above with the same force and effect as if set forth herein in full.

FIRST AFFIRMATIVE DEFENSE

5. For its first affirmative defense to the Complaint, defendant states that whatever injuries or damages may have been sustained by plaintiff as alleged in the Complaint herein were caused by or contributed to by the negligence and carelessness of the plaintiff, and such negligence and carelessness contributed directly and proximately to the happening of any said injuries or damages, and defendant Stencel Aero Engineering Corporation, therefore, is not liable to the plaintiff.

SECOND AFFIRMATIVE DEFENSE

6. For its second affirmative defense to the Complaint of plaintiff, defendant states that, at the time it left defendant Stencel Aero Engineering Corporation's custody and control, the modification kit to the seat ejector system, including any parts or components of said modification kit, which was installed on the aircraft described in the Complaint was not unreasonably dangerous or defective,

and was produced in accordance with the plans and specifications of defendant Stencel Aero Engineering Corporation and was safe, of merchantable quality, and contained no inherent defect.

THIRD AFFIRMATIVE DEFENSE

7. For its third affirmative defense to the Complaint of plaintiff, defendant states that at and immediately prior to the time of the incident alleged in the Complaint, plaintiff was aware of the condition of the aircraft and its component parts involved in this action and did knowingly and voluntarily proceed to operate the aircraft and did knowingly and voluntarily assume whatever risks were involved in operating said aircraft at the time of the incident alleged in the Complaint.

FOURTH AFFIRMATIVE DEFENSE

8. For its fourth affirmative defense to the Complaint of plaintiff in this action, defendant Stencel Aero Engineering Corporation alleges, upon information and belief, that at the time of the incident alleged in the Complaint the aircraft and its component parts were not being used by plaintiff for the purpose for which they are intended to be used but instead were being misused.

WHEREFORE, defendant Stencel Aero Engineering Corporation prays for judgment dismissing the Complaint, together with costs and disbursements of this action and such other and further relief as the court may deem proper and affirmative.

CROSSCLAIM

Comes now defendant Stencel Aero Engineering Corporation and for its crossclaim against defendant United States of America alleges and states as follows:

9. This crossclaim is within the ancillary jurisdiction of this court for the reason that the claim for relief set forth herein arises out of the same transaction or occurrence that is the subject matter of plaintiff's Complaint.

10. Plaintiff has alleged in his Complaint that he was seriously and permanently injured as a result of using an egress life support system while piloting an F-100D fighter aircraft over the eastern sector of Missouri. Plaintiff further alleges that said egress life suport system malfunctioned and that such malfunction was precipitated by the negligence and carelessness of the defendants individually and jointly.

11. If all or some portion of the egress life support system which plaintiff alleges to have used in connection with the accident referred to in his Complaint was manufactured by defendant Stencel Aero Corporation, then such system or portion thereof was manufactured by defendant Stencel Aero Engineering Corporation according to the specifications and requirements provided by defendant United States and, in some instances, using components supplied by the United States or other persons under contract with the United States.

12. In all respects in the manufacturing any such egress life support system or any portion thereof, defendant

Answer and Cross-Claim of Defendant
Stencel Aero Engineering Corporation

Stencel Aero Engineering Corporation acted in a careful and prudent manner.

13. At the time it left defendant Stencel Aero Engineering Corporation, any such system or portion thereof was not unreasonably dangerous or defective and was safe, of merchantable quality and contained no inherent defect.

14. At all times after manufacture of any such egress life support system or any portion thereof by defendant Stencel Aero Engineering Corporation said system was in the custody and control of defendant United States and its agents and was from time to time repaired and maintained by said United States.

15. In the event plaintiff obtains judgment against defendant Stencel Aero Engineering Corporation in this action, defendant United States will be liable pursuant to 28 U.S.C. §2674 to indemnify defendant Stencel Aero Engineering Corporation for the reason that defendant United States was actively negligent in the actions, events and omissions alleged in the Complaint, if in fact such actions, events and omissions constitute negligence, and the negligence of defendant Stencel Aero Engineering Corporation, if any, was passive only.

16. This defendant has been and will be compelled to incur attorneys' fees and expenses in this action and is entitled to recover the amount of such fees and expenses from defendant United States.

WHEREFORE, defendant Stencel Aero Engineering Corporation prays that this court enter judgment against defendant United States for any and all sums that may be adjudged against defendant Stencel Aero Engineering Corporation in favor of the plaintiff in this cause, and further for judgment against defendant United States for its reasonable attorneys' fees and expenses incurred in this action.

Answer and Cross-Claim of Defendant
Stencel Aero Engineering Corporation

(Certificate of Service Omitted in Printing.)

Filed January 7, 1975

Motion For Summary Judgment by the United States

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

Civil No. 74-711C (4)

[Title Omitted in Printing]

Defendant United States of America pursuant to Rules 12 and 56 of the Federal Rules of Civil Procedure, respectfully moves for summary judgment in the above-titled action on the ground that the Court is without jurisdiction and the complaint fails to state a claim upon which relief can be granted in that plaintiff's injury was incurred incident to his military service and that recovery in such instances is precluded by the Supreme Court decisions in *Feres* v. *United States*, 340 U.S. 135 (1950). Plaintiff's complaint fails to state a claim upon which relief can be granted. The United States is entitled to judgment as a matter of law.

FILED

January 20, 1975

Affidavit in Support of Motion of United States For Summary Judgment

[Title Omitted in Printing]

I, JAMES P. PIPER, being first duly sworn, depose and say:

That I am a Major in the United States Air Force, currently assigned as Assistant Chief, Claims Division, Office of The Judge Advocate General, USAF, Washington, D. C. In this capacity I am responsible for administrative claims filed against the Air Force under 28 U.S.C. 2671-2680 and for assisting other government agencies in the adjudication, settlement and litigation of administrative claims filed against them involving Air Force personnel, property or activities.

That in this capacity I have examined the Air Force Personnel Records pertaining to Captain John Clyde Donham.

That this affidavit is made in support of the Defendant's, United States of America's, motion to dismiss.

That I am familiar with this litigation.

That reference will be made in this affidavit to the following extracts of the official Air Force Personnel Records pertaining to Captain John Clyde Donham:

Computer summary and history of pay records of Captain John Clyde Donham is Attachment 1 hereto.

Special Order Number AC-2722, dated 25 January 1974 and issued by Department of the Air Force, Washington, D. C., is Attachment 2 hereto.

Letter from AFMPC/DPMRA2/t5p, Randolph AFB, Texas, dated 29 January 1974, Subject: Disability Retirement (Permanent) is Attachment 3 hereto.

That Captain John Clyde Donham received disability pay under the provisions of 32 U.S.C. 318 in the following amounts on the following dates: (See Attachment 1).

Affidavit in Support of Motion of United States for Summary Judgment

30 June 1973	$1,093.49
9 July 1973	835.00
16 July 1973	751.09
22 August 1973	751.09
15 September 1973	751.09
30 September 1973	751.09
15 October 1973	751.09
31 October 1973	691.74
15 November 1973	691.74
15 December 1973	1,383.44
28 December 1973	691.74
15 January 1974	691.74
31 January 1974	691.74
15 February 1974	645.62

That Captain John Clyde Donham was determined to be physically disqualified for the performance of active military service and was permanently retired effective 15 February 1974. See Attachments 2 and 3.

That Captain John Clyde Donham received active duty training pay in the total amount of $83.91 for performing during an entire day's Unit Training Activity on 9 June 1973. See Attachment 1.

/s/ JAMES P. PIPER
JAMES P. PIPER, Major, USAF
Assistant Chief, Claims Division
Office of The Judge Advocate General

Subscribed and sworn to before me this 17th day of January 1975 in the City of Washington, District of Columbia.

/s/ MABEL M. BURNASSOR

Attachment 1 to Affidavit in Support of Motion

[Omitted in Printing]

Attachment 2 to Affidavit in Support of Motion

Retirement Order t5p

January 25, 1974

Special Order Number AC-2722

DEPARTMENT OF THE AIR FORCE, WASHINGTON

Under the provisions of Section 1204 and 1372, Title 10 USC, CAPTAIN JOHN C. DONHAM, 356-34-7225, Reserve AF (ANGUS), is relieved from assignment 110 Tactical Fighter Sq, TAC, PO Box 10038, Lambert Field MO 63145, and Permanently Retired for disability and transferred to the Retired Reserve Section effective 15 February 1974. Present Address: 720 Alice Street, Dexter MO 63841; SDN 77M; Active Service for Retirement: 03 years, 02 months, 24 days; Service for Basic Pay: 09 years 00 months, 22 days; Service per Section 1333, Title 10 USC: 04.45. Grade Retired in: Captain; Highest Grade Held on Active Duty: Captain; Date of Birth: 9 Oct 42; Compensable Percentage of Physical Disability: 80%. Disability Received in Line of Duty as a Direct Result of Armed Conflict or Caused by an Instrumentality of War and Incurred in Line of Duty During a Period of War: Yes.

By Order of the Secretary of the Air Force

George S. Brown,
General, USAF
Chief of Staff

(Seal)

Jack R. Benson, Colonel, USAF
Director of Administration

Distribution:

A–Officers	XX C–Officers	
		50 copies:
B–Airman	D-Airman	AFMPC/DPMARA2

Attachment 3 to Affidavit in Support of Motion

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS UNITED STATES AIR FORCE
WASHINGTON, D.C. 20330

(seal)

29 January 1974

Reply to
attn of:

AFMPC/DPMARA2/t5p
Randolph AFB Texas 78148

Subject:

Disability Retirement (Permanent)

To:

Chief, National Guard Bureau/DPMA
Washington DC 20310

1. Under the provisions of Chapter 61, Title 10 USC (AFM 35-4), the following determinations were made in the Office of the Secretary of the Air Force with respect to Captain John C. Donham, 356-34-7225, 110 Tactical Fighter Sq, TAC, PO Box 10038, Lambert Field MO 63145:

a. The member is physically disqualified for the performance of active military service.

b. The member is being permanently retired effective 15 February 1974 (copies of retirement orders attached).

Attachment 3

2. Upon completion of administrative processing required by your Headquarters, the inclosed orders should be forwarded to the member.

FOR THE CHIEF OF STAFF

/s/ Jack W Reiner LCol
Max L. Pettijohn, Colonel, USAF
Directorate of Personnel
Program Actions

1 Atch
DAFSO AC-2722, 25 Jan 74
(50 copies)

Cy to: 110 Tac Ftr Sq, TAC
Lambert Fld MO 63145

Answer to Cross-Claim of Defendant Stencil Aero Engineering Corporation

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MISSOURI

[Title Omitted in Printing]

Now comes defendant, United States of America, and for its answer to the cross-claim of Stencil Aero Engineering Corporation states and avers as follows:

1. The United States denies the allegations of paragraphs 9, 11, 12, 13, 14, 15 and 16 of the Cross-Claim of Defendant Stencil Aero Engineering Corporation.

2. Responding to the allegations of paragraph 10 of the Cross-Claim of Defendant Stencil Aero Engineering Corporation, the United States admits Captain John C. Donham was a member of the Missouri Air National Guard on June 9, 1973, and while piloting an F-100D aircraft over the eastern sector of Missouri, ejected from said aircraft. All other allegations and inferences of paragraph 10 are denied.

AFFIRMATIVE DEFENSES

1. The cross-claim fails to state a cause of action upon which relief can be granted against the United States.

2. The provisions of 28 U.S.C. §2680(a) and (h) are applicable to the United States.

3. The United States denies that any negligent or wrongful act or omission on the part of any agent or

representative of the United States caused or contributed to plaintiff's alleged injury.

4. Any liability that may exist for plaintiff's alleged injury lies in a third party, not the United States.

WHEREFORE, cross-defendant, United States of America, demands judgment dismissing the cross-claim herein, together with its costs and disbursements and for such other further and different relief which the Court may deem just and proper.

Filed March 7, 1975

(Certificate of Service Omitted in Printing.)

Motion to Dismiss the Cross-Claim of Stencel Aero Engineering Corporation

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

[Title Omitted in Printing]

Now comes defendant, United States of America pursuant to the provisions of Federal Rules of Civil Procedure 12(b)(1) and (6) and moves the Court to dismiss the cross-claim of Stencel Aero Engineering Corporation against the United States.

The United States contends: (1) the existence of an exclusive system of compensation to Captain John C. Donham precludes Stencel's cross-claim against the United States; and, (2) the applicability of the *Feres* military discipline policy to the instant case precludes Stencel's cross-claim against the United States.

For the foregoing separate, independent reasons which are outlined in the attached Memorandum, the United States urges the Court to conclude it lacks jurisdiction and that the cross-claim fails to state a claim upon which relief can be granted. Therefore, the United States requests the Court to dismiss Stencel's cross-claim against the United States.

(Certificate of Service Omitted in Printing.)

Filed March 13, 1975

Order dated May 15, 1975

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

[Title Omitted in Printing]

Pursuant to a memorandum of the Court filed this date and incorporated herein,

IT IS HEREBY ORDERED that the motion of the United States for summary judgment against the plaintiff be and is sustained; and

IT IS FURTHER ORDERED that the motion of the United States to dismiss the cross-claim of the defendant Stencel Aero Engineering Corporation be and is sustained with prejudice.

/s/ JOHN F. NANGLE
John F. Nangle
United States District Judge

Filed: May 15, 1975.

Memorandum dated May 15, 1975

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

No. 74—711 C (4)

[Title Omitted in Printing]

This action is before the Court upon the motions of the defendant United States for summary judgment against the plaintiff John C. Donham and to dismiss the cross-claim of co-defendant Stencel Aero Engineering Corporation ("Stencel").

Plaintiff seeks substantial damages against the United States and two private corporations for injuries sustained when, as a Missouri Air National Guard pilot, he was forced to eject from his jet aircraft in flight over Missouri. He alleges that a defect in the egress life support system, precipitated by defendants' negligence, caused his injuries. The action is brought pursuant to the Federal Tort Claims Act ("Act"), 28 U.S.C. §§2671-2680; diversity of citizenship is alleged to exist.

The United States moves for summary judgment on the ground that plaintiff's injury was incurred incident to his military service and that recovery against the United States under the Act is precluded by the teachings of *Feres* v. *United States,* 340 U.S. 135 (1950), and *United States* v. *Demko,* 385 U.S. 149 (1966). The Supreme Court in *Feres* ruled that the United States is not liable under the Act "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service". 340 U.S. *at* 146. In *Demko* the Court ruled that a federal prisoner, injured in the performance of an assigned prison task, was limited to his exclusive statutory remedy of compensation under 18 U.S.C. §4126. He was precluded from suit under the Federal Tort Claims Act. *Feres* and *Demko* are sought to be applied alternatively by the United States.

The Court is of the opinion that plaintiff's status as a Missouri Air National Guard pilot is sufficiently related to federal military service to apply the *Feres* ruling to bar his claim against the United States. 10 U.S.C. §§8062, 8077 and 8499; 32 U.S.C. §§104, 106, 110, 502; 27 U.S.C. §301. *See also Layne* v. *United States,* 295 F.2d 433 (7th Cir. 1961), *cert. den.,* 368 U.S. 990 (1961). Since the *Feres* ruling is founded on the doctrine of sovereign immunity, the Court will dismiss plaintiff's claim against the United States for lack of subject matter jurisdiction.

Stencel seeks indemnification against the United States by cross-claim alleging that Stencel manufactured the life egress system according to government specifications, that after manufacture the system was in the custody of and maintained by the United States, and that if at all Stencel's alleged negligence is passive and that of the United States is active. The United States argues that, to allow Stencel to recover against the United States on indemnity is to allow recovery indirectly of what could not be recovered by the injured plaintiff directly.

The Court agrees with the United States. In *Terminal R. Ass'n. of St. Louis* v. *United States,* 182 F.2d 149 (8th Cir. 1950), *cert. den.,* 340 U.S. 825 (1950), the Court of Appeals ordered dismissed for lack of subject matter jurisdiction a claim for indemnity against the United States. In that case the injured plaintiff's claim against the United States under the Federal Tort Claims Act was dismissed as barred by sovereign immunity. The plaintiff's

Memorandum dated May 15, 1975

claim arose prior to the effective date of the Act. The immunity of the United States to plaintiff's claim rendered the claim for indemnity an "ethical" one only. That case governs Stencel's claim for indemnity against the United States. It will be dismissed for lack of subject matter jurisdiction.

/s/ JOHN F. NANGLE
John F. Nangle
United States District Judge

Filed: May 15, 1975.

Order dated June 4, 1975

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

No. 74—711 C (4)

[Title Omitted in Printing]

Upon motion of defendant Stencel Aero Engineering Corporation, pursuant to Rule 54(b), Federal Rules of Civil Procedure,

IT IS HEREBY ORDERED that the order of the Court filed May 15, 1975, dismissing the cross-claim of defendant Stencel Aero Engineering Corporation against the United States, be and is entered as a final judgment with respect to said cross-claim, the Court having determined that there is no just reason for delay.

/s/ JOHN F. NANGLE
John F. Nangle
United States District Judge

Filed: June 4, 1975.

Opinion of the Eighth Circuit

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 75-1516

Submitted: February 11, 1976. Filed: June 4, 1976.

JOHN C. DONHAM,

Plaintiff,

v.

UNITED STATES OF AMERICA,
STENCEL AERO ENGINEERING CORP.,
and MILLS MANUFACTURING CORP.,

Defendants.

STENCEL AERO ENGINEERING CORP.,

Cross-Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Cross-Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

Before:

GIBSON, *Chief Judge;* BRIGHT, *Circuit Judge;* and
VAN PELT, *Senior District Judge.**

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* ROBERT VAN PELT, Senior District Judge, District of Nebraska, sitting by designation.

Opinion of the Eighth Circuit

BRIGHT, *Circuit Judge.*

This appeal presents an important issue under the Federal Tort Claims Act (FTCA): whether the United States which is immune to liability for its negligent conduct producing injury and damages to an on-duty serviceman may, nevertheless, be obligated indirectly to pay the amount of such damages through a claim for tort indemnity asserted by a third party who becomes liable for tort damages to that serviceman. We answer that issue in the negative.

Captain John C. Donham, an Air Force Reserve pilot assigned for training to the Missouri Air National Guard, while flying over Eastern Missouri, ejected from his military aircraft under emergency conditions. As a result of the malfunctioning of his aircraft's "egress life support system," he claims to have sustained serious and permanent injuries. This incident gives rise to the present appeal. Stencel Aero Engineering Corporation (Stencel) manufactured this system. Donham brought an action to recover for his bodily injuries, and he named as defendants, Stencel, the United States, and Mills Manufacturing Corporation. Stencel answered the complaint denying any liability and instituted a cross-claim against the United States for total indemnity.

The United States moved for judgment on the pleadings against both Captain Donham and Stencel. In response to this motion, the district court dismissed Captain Donham's action against the United States on grounds of sovereign immunity, relying upon *Feres* v. *United States,* 340 U.S. 135 (1950), and *United States* v. *Demco,* 385 U.S. 149 (1966). Relying on these same cases, the district court also dismissed Stencel's cross-claim for indemnity. The court certified its disposition of Stencel's cross-claim as a final

appealable judgment under Rule 54(b), Fed. R. Civ. P., and Stencel now appeals that judgment.[1]

Although the doctrine of *Feres* v. *United States, supra,* precludes Captain Donham from proceeding directly against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. §2674, that doctrine, according to Stencel's contention, does not preclude Stencel as a non-military third party from obtaining restitution by way of indemnity against the United States for any damages which it might be compelled to pay to Donham. Stencel alleges that it manufactured and constructed the ejection system according to specifications and requirements provided by the United States and, in part, using components supplied by the United States.[2] After manufacture, Stencel alleges that the United States took custody and control of the egress system and assumed responsibility to repair and maintain the system and to warn and instruct government employees in its proper use.

Stencel alleges that these facts imposed an independent duty upon the United States to assure Stencel that the system was not defective or inherently dangerous. Stencel

[1] Neither the plaintiff, Captain Donham, nor a third defendant, Mills Manufacturing Corporation, is a party to this appeal. We are concerned here only with the rights, if any, of Stencel to seek indemnity against the United States for the claim made against it by the serviceman. Since judgment was granted prior to any discovery, we are concerned only with the facts as pleaded.

[2] The Government's brief cites several cases which suggest that these allegations, if true, may constitute a defense by Stencel to Captain Donham's complaint. *See, e.g., Littlehale* v. *E.I. du Pont de Nemours & Co.*, 268 F. Supp. 791, 804 (S.D. N.Y. 1966), *aff'd*, 380 F.2d 274 (2d Cir. 1967); *Myers* v. *United States*, 323 F.2d 580 (9th Cir. 1963); *Merritt, Chapman & Scott Corp.* v. *Guy F. Atkinson Co.*, 295 F.2d 14, 16 (9th Cir. 1961). This question is not before us.

argues that should it suffer any liability because of Government's breach of its duty, it should recover indemnification in full. Further, Stencel alleges that if Donham's injuries resulted from negligence, the Government's conduct constituted active negligence but Stencel's improper conduct, if any, constituted passive negligence. Stencel argues that such a disparity of fault gives rise to a right of indemnity in favor of Stencel. Stencel asserts, appropriately, that judgment on the pleadings for dismissal can be sustained only if it is clear beyond doubt that Stencel could prove no set of facts in support of its indemnity claims, entitling it to relief. *See Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957); *Bramlet* v. *Wilson*, 495 F.2d 714, 716 (8th Cir. 1974).

Stencel relies upon the Supreme Court's statement that through the FTCA the United States has waived its immunity from tort suits in "sweeping language." *United States* v. *Yellow Cab Co.*, 340 U.S. 543, 547 (1951).[3] Generally, the United States subjects itself to suit under the FTCA to the same extent as a private individual under similar circumstances in accordance with the law of the state where the tort occurred. Stencel cites several Missouri cases for the proposition that indemnity relief would be available to it under state law. *Feinstein* v. *Edward Livingston & Sons, Inc.*, 457 S.W.2d 789 (Mo. 1970); *Kansas City Southern Ry. Co.* v. *Payway Feed Mills, Inc.*, 338 S.W.2d 1 (Mo. 1960); *Western Casualty & Surety Co.* v.

[3] 28 U.S.C. §2674 (Federal Tort Claims Act), in part provides:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

The jurisdictional counterpart of this provision is contained in 28 U.S.C. §1346(b).

Shell Oil Co., 413 S.W.2d 550 (Mo. App. 1967). While the United States denies that Missouri law authorizes indemnity under similar circumstances, it asserts as its principal defense that federal law applies and that a claim for damages sustained by a serviceman on active duty, whether asserted directly by that serviceman or indirectly by a third party by way of indemnity, is barred by application of the doctrine of the *Feres* case.

I. *The Scope of the Federal Government's Waiver of Sovereign Immunity Is a Question of Federal Law.*

The Federal Tort Claims Act substantially changed prior law. First, it waived the Government's sovereign immunity to most tort actions and provided for suits against the United States in the federal district courts. Second, it adopted the substantive law of the state in which the tort occurred as the standard of conduct to assess the Government's liability. Since, as we have previously observed, the scope of the waiver of sovereign immunity is quite broad, federal courts have usually focused upon interpretation and application of state law in resolving claims for indemnity.[4]

However, the extent of the waiver remains an important consideration. Without a waiver of sovereign immunity applying to the claim asserted, the claim against the Government must fall. Where a question arises as to the extent of the waiver of sovereign immunity under the

[4] *See, e.g., Adams* v. *General Dynamics Corp.*, No. 74-3484 (9th Cir., Apr. 15, 1976) (California law); *Certain Underwriters at Lloyd's* v. *United States*, 511 F.2d 159 (5th Cir. 1975) (Louisiana law; *Maddux* v. *Cox*, 382 F.2d 119 (8th Cir. 1969) (Arkansas law); *United Air Lines* v. *Wiener*, 335 F.2d 379 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964) (Nevada law).

FTCA, the issue "is a question of federal law, separate and prior to the question of • • • liability under state law." *See Galimi* v. *Jetco, Inc.*, 514 F.2d 949, 952 (2d Cir. 1975); *Travelers Insurance Co.* v. *United States*, 493 F.2d 881, 883 (3d Cir. 1974).

II. *The United States Has Not Consented Under the Federal Tort Claims Act to be Sued for Indemnity by a Government Contractor Who is Liable to a Serviceman for Injuries Occurring on Active Duty.*

Where the United States authorizes suit under the FTCA, its liability is determined by the law of the place where the act or omission occurred to the same extent as a private defendant. 28 U.S.C. §1346(b). That the Act incorporates such state standards is a matter "not without significance" in determining "whether the Act should be construed to apply • • •." *Feres* v. *United States, supra*, 340 U.S. at 142. Stencel's claim against the United States rests upon two basic relationships—first, the military relationship between Captain Donham and the United States, and second, the military-contractual relationship between the United States and Stencel. In order to justify Stencel's action against the United States, we must infer that Congress in the FTCA intended that state law apply to situations arising out of these two relationships.

Each of these relationships long has been held to be governed exclusively by federal law. In *Feres*, the Supreme Court reaffirmed the long-recognized rule that the "relationship between the Government and members of its armed forces is 'distinctively federal in character • • •.'" 340 U.S. at 143, *quoting United States* v. *Standard Oil Co.*, 332 U.S. 301 (1947). In *Standard Oil*, the court emphasized that

> [t]o whatever extent state law may apply to govern the relations between soldiers or others in the armed forces and persons outside them or nonfederal governmental agencies, the scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority. [*Id.* at 305-06.]

Likewise, it is firmly established that the rights and duties of the United States arising pursuant to its contractual obligations primarily are governed by federal common law. *Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275 (1958); *see Clearfield Trust Co.* v. *United States,* 318 U.S. 363 (1943). *Cf. Whelan* v. *Penn Central Co.,* 503 F.2d 886 (2d Cir. 1974).

Thus, both essential aspects of the current case have long been committed to federal law. To conclude that the general language of the FTCA makes applicable the vagaries of state law would surely be, in the language of *Feres,* to "visit the Government with novel and unprecedented liabilities." 340 U.S. at 142. Again in the language of *Feres,* "[w]e cannot impute to Congress such a radical departure from established law in the absence of express congressional command." *Id.* at 146.

The rationale of the Court in *Feres* is, we believe, applicable to Stencel's indemnity claims. This bolsters our conclusion that Congress did not intend to permit this type of indemnity claim under the FTCA.

In *Feres,* the Court first observed that the FTCA was not intended to create new and unusual causes of action but was simply intended to permit the application of *appropriate* state law. *Id.* at 142. The Court then noted

that the Government's authority over a member of the Armed Services is without parallel among private parties.[5] In particular, the Government's right to assign a serviceman to active duty in any single state or to several states makes it unreasonable that rights and obligations between the active duty soldier and his government should turn on accidents of political geography. *Id.* at 143. These same considerations militate strongly against Stencel's indemnity claims as well. Precisely because of the Government's unique interests and powers, its contractual obligations with material suppliers are controlled by federal law. The policies behind this rule become particularly compelling when the Government is purchasing military equipment. The Government is privileged to procure, maintain, and utilize its military hardware in a manner inappropriate for private parties. The mobility of the Armed Forces is due, in large part, to military equipment such as Captain Donham's aircraft, which can move rapidly across this country as well as overseas.

It makes little sense to say that the duty of the United States to indemnify Stencel, a North Carolina corporation, should turn upon the fortuity that an aircraft which incorporated a Stencel product happened to crash in Missouri. Thus, since Stencel's relationship to the United

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[5] In commenting upon *Feres,* in a 1954 case, the Court noted the special nature of the military relationship:

> The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the Court to read that Act as excluding claims of that character. [*United States* v. *Brown,* 348 U.S. 110, 112 (1954).]

See Alexander v. *United States,* 500 F.2d 1 (8th Cir. 1974).

States lies in a military context and the claim arises out of injuries to a serviceman, the underlying rationale of the *Feres* case suggests that provisions of the FTCA should not be read to extend to such relationships. Moreover, we think it would be anomalous to insulate the United States from claims of a serviceman for recovery of tort damages for service-incurred injuries but authorize a third party in the position of Stencel to force the United States to indirectly pay those damages.

In our view, the rule adopted in *Feres* serves to bar the serviceman's claim for injuries whether asserted directly by him or asserted by one seeking restitution through a tort indemnity theory.[6] This result, though not necessarily the rationale, receives support from other decided cases.

Five courts of appeals have faced the question of a claim against the United States under the FTCA for indemnity of claims arising from injury in a military context. All but one of these courts have denied indemnity and contribution.[7] However, the circuits have not adopted

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[6] Stencel has been careful to confine its contract-related claim to the assertion of a duty "*implied in law* out of the relationship between Stencel and the United States * * *." However, Stencel has cited some authority for the proposition that, in at least some government contracts which set detailed standards of performance, an agreement to indemnify is *implied in fact*. *See, e.g., J.D. Hedin Const. Co., Inc.* v. *United States*, 347 F.2d 235, 241 (Ct. Cl. 1965). Such alleged right, if cognizable as a contract right, might be asserted in the Court of Claims under the Tucker Act, 28 U.S.C. §1346(b)(2). *See Murray* v. *United States*, 405 F.2d 1361, 1366 (D.C. Cir. 1968); *cf. Travelers Insurance Co.* v. *United States*, 493 F.2d 881, 999 (3d Cir. 1974).

[7] A number of federal courts have discussed a somewhat analogous issue raised by the exclusive remedy provision of the Federal Employees' Compensation Act (5 U.S.C. §8116(c)) and with varying rationales have either denied or allowed third party recovery for contribution or indemnity from the United States. *See Wallenius Bremen G.m.b.H.* v. *United States*, 409 F.2d 994 (4th Cir. 1969), *cert. denied*, 398 U.S. 958 (1970); Annot., 12 A.L.R. Fed. 616 (1972).

a consistent rationale and the language of the various opinions cannot be harmonized. Although several of these opinions have said that the *Feres* holding is not a *per se* bar to third party indemnity claims, none has considered whether the considerations underlying *Feres* require a limitation of the right under the FTCA to seek indemnity against the United States for damages paid to compensate for a serviceman's injury.

The most recent decision of which we are aware is *Adams* v. *General Dynamics Corp.*, —— F.2d ——, No. 74-3484 (9th Cir., Apr. 15, 1976). In *Adams*, the Ninth Circuit reaffirmed its prior holdings denying indemnity in *Wien Alaska Airlines, Inc.* v. *United States*, 375 F.2d 736 (9th Cir.) *cert. denied*, 389 U.S. 940 (1967), and *United Air Lines, Inc.* v. *Wiener*, 335 F.2d 379 (9th Cir.), *cert. dismissed sub nom., United Air Lines, Inc.* v. *United States*, 379 U.S. 951 (1964). In each of these cases the claims arose out of a collision between a military and a private aircraft resulting from the fault of both pilots. In *Wiener*, the negligence of the military pilot was primarily responsible for the collision. The court permitted United Air Lines to recover full indemnity against the Government for the damages paid all civilian passengers of the private aircraft. However, the court denied any restitution to United Air Lines for damage awards to the civilian and military federal employees injured while flying in the military aircraft.

With respect to the civilian federal employees, the court held that neither "contribution nor indemnity may be awarded without the support of liability on the part of the indemnitor [the United States] to the person injured [the civilian government employees]." *Id.* at 403. The court held that the exclusive liability provision of the

Federal Employees Compensation Act precluded finding the necessary tort liability of the Government to the civilian employees. The court then considered the servicemen cases and ruled that

> [w]ith respect to the two servicemen cases, United's claim for indemnity must fall for the reason that the government is not liable under the Federal Tort Claims Act for injuries to servicemen where injuries arise out of or are in the course of activity incident to service. Feres v. United States, 340 U.S. 135 * * *. [*Id.* at 404.]

The other two Ninth Circuit cases involve similar facts and reach the same result. All of these decisions rested solely upon tort liabilities; no implied contractual or quasicontractual rights—attenuated or otherwise—were advanced or decided. *Cf. Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956); *Weyerhaeuser S.S. Co.* v. *United States*, 372 U.S. 597 (1963).

In *Maddux* v. *Cox*, 382 F.2d 119 (8th Cir. 1967), a Navy vehicle collided with a private auto as the result of mutual fault. A serviceman passenger in the Navy vehicle recovered against the private driver. The private driver, in turn, sought to shift part or all of the burden to the United States because of the negligence of the Navy driver. The court construed the claim as one for contribution and denied recovery on the merits. Although the case was technically decided under state law, the Ninth Circuit's decisions in *Wien* and *Wiener, supra,* were cited[8] for the

[8] 382 F.2d at 124. Because of these citations, *Maddux* has been read as applying to indemnity as well as contribution. *Newport Air Park, Inc.* v. *United States*, 419 F.2d 342 (1st Cir. 1969); *Murray* v. *United States*, 405 F.2d 1361 (D.C. Cir. 1968).

proposition that such recovery could not be had in the absence of direct liability of the United States to the injured party. Again, no contractual relationship existed between the party seeking indemnity and the United States.

The Tenth Circuit considered a similar issue in *Barr* v. *Brezina Construction Co.*, 464 F.2d 1141 (10th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973). There, two contractors had remodeled a building at Hill Air Force Base pursuant to faulty government specifications. A serviceman sustained injuries because of the faulty construction and brought suit against the contractors. The contractors settled the claim for $45,000, then sought indemnity from the United States. The district court dismissed the complaint, holding that *Feres* barred any indemnity and, alternatively, that the contractors were guilty of active negligence in knowingly constructing the building in compliance with patently defective specifications. The Government's negligence in providing the specifications was termed passive.

The Tenth Circuit ruled that the *Feres* doctrine *per se* did not preclude the action for indemnity, and stated in addition that under the Supreme Court's holdings in *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S.S. Co., supra; Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co., Inc.*; 355 U.S. 563 (1958); and *Treadwell Construction Co.* v. *United States, supra,* "a party seeking indemnity is not barred at the threshold." 464 F.2d at 1144. However, the court went on to affirm the dismissal of the indemnity claim on the grounds that the contractor's active negligence precluded ordinary tort indemnity and that no implied warranty could be found to support a quasicontractual claim.

The court specifically declined to extend the Supreme Court's admiralty-related cases to cover the situation. The court said:

> [W]e are constrained to hold that neither the *Ryan* nor *Weyerhaeuser* nor any of the other *Ryan* progeny governs. These cases all arise in the admiralty area, and most courts have refused to apply liberally the concept of implied warranty or implied contract to indemnify in other fields. [464 F.2d at 1145 (footnote omitted).]

Appellant-Stencel emphasizes the following language from *Barr*:

> [I]t does not follow [from *Feres*] that a defendant-third-party plaintiff who has been subjected to liability by a serviceman inherits, so to speak, the limitations which apply to the serviceman, since his is an independent remedy based on different considerations. [*Id.* at 1143.]

This statement is correct as far as it goes. However, it does not proceed to an analysis of those "different considerations" in light of the *Feres* rationale. In *Barr*, the contractor's own active negligence offered a simple basis for affirming the dismissal. Here, because of the sparse record, we have been compelled to squarely confront the reach of the FTCA in circumstances of this case in light of the underlying rationale of *Feres*.[9]

[9] It is interesting that the Ninth Circuit panel which decided *Adams* v. *General Dynamics Corp.*, *supra*, included both the trial judge in *Barr* and a member of the appellate panel in that case. The *Adams* panel notes that the broad language of *Barr* is somewhat inconsistent with other Tenth Circuit precedent and suggests that the decision should be considered to rest upon the active negligence of the contractors and the passive negligence of the Government. Slip op. at 5 n.6.

That panel observed that the ambiguous holding and peculiar history of *Treadwell Construction Co.* v. *United States*, 372 U.S 772 (1963) (*per curiam*), is of " 'little manifest significance,' " and that the Supreme Court has, in fact, " 'left the issue [of third party indemnity in nonadmiralty cases] squarely undecided.' " Slip op. at 5 n.6, *quoting* Note, *Federal Law—Contribution and Indemnity Under the Federal Employees' Compensation Act*, 6 Toledo L.Rev. 272, 282 n.42 (1974). The *Treadwell* decision seems of limited significance in cases arising out of injuries to a member of the Armed Forces on active duty.

The Fifth Circuit considered the indemnity issue as related to an injured serviceman in *Certain Underwriters at Lloyd's* v. *United States*, 511 F.2d 159 (5th Cir. 1975). There a military serviceman sustained injuries at the hands of a surgeon and nurses of the United States Public Health Service. The district court had dismissed his suit against the surgeon and nurses as not sanctioned by the FTCA read in light of *Feres*. This ruling was not appealed by the serviceman. However, the serviceman also had brought a direct action against the malpractice insurer of the operating surgeon as permitted by Louisiana law. Lloyd's, the insurer, settled the case for $75,000, and sought contribution from the Government on the theory that the United States Public Health Service nurses assisted in the allegedly negligent treatment. Lloyd's contended that according to the Louisiana Civil Code, this made the nurses, and hence the United States, liable to Lloyd's as debtors "in solido." [10]

[10] LSA-Civil Code Article 2103 provides:

> When two or more debtors are liable in solido . . . [the obligation] should be divided between them. As between the solidary debtors, each is liable only for his virile portion of the obligation. [*Certain Underwriters at Lloyd's* v. *United States*, 511 F.2d 159, 161 (1975).]

The meaning of the term "in solido," as used in the above statute, is found in Article 2091 of the Civil Code:

> There is an obligation *in solido* on the part of the debtors, when they are all obliged to the same thing, so that each

The court determined that under Louisiana law no right to contribution existed because the United States could not be held liable to the serviceman in his own right and hence, could not be considered liable "in solido" with Lloyd's. The court considered its conclusion to be consistent with that reached by this circuit in *Maddux* v. *Cox, supra,* 511 F.2d at 163. It noted that the insurer had relied on the opinions in *Barr* v. *Brezina Construction Co., supra,* and *Wellington Transportation Co.* v. *United States,* 481 F.2d 108 (6th Cir. 1973), discussed *infra.* Although these decisions did not compel a determination favorable to the insurer, the court stated:

> We are in agreement with the expression in those opinions that *Feres* itself does not bar a third party suit against the United States for indemnity. [511 F.2d at 163.]

As in *Barr* v. *Brezina Construction Co., supra,* the court did not discuss whether the underlying rationale of *Feres* might preclude indemnity.

In *Wellington Transportation Co.* v. *United States, supra,* the Sixth Circuit held that a third party in a posture similar to that of Stencel may obtain indemnity. *Wellington* arose under admiralty law when a Coast Guard cutter and an automobile ferry, operated by Wellington Transportation Company, collided. A member of the Coast Guard in active service was injured and brought an action against Wellington to recover for his injuries. He failed in his claim but Wellington incurred substantial expense

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may be compelled for the whole, and when the payment which is made by one of them exonerates the others toward the creditor. [511 F.2d at 161.]

in defending the action. Wellington thereafter brought an action against the United States for indemnity to obtain reimbursement of the attorney's fees and expenses incurred in successfully defending against the principal action.

The court rejected a contractual indemnity theory such as was recognized by the Supreme Court in *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S.S. Corp., supra.* As an alternative, Wellington claimed entitlement to reimbursement under the theory of tort indemnity. The district court had denied the claim relying on *Feres.* The Sixth Circuit disagreed, reading *Feres* as "concerned only with an injured serviceman's direct remedy against the United States" and finding that "nothing in the Court's opinion suggests that the holding of that case was intended to apply to a third party's claim for indemnity against the United States." 418 F.2d at 111. The court then determined that the right to tort indemnity was properly allowable under federal maritime law. However, the court remanded for further proceedings since the record did not establish that appellant's attorney's fees had been incurred in defense of a liability based upon appellant's "passive," "constructive," "vicarious," or "insulated" fault, for which the Coast Guard was the "primary" or "active" wrongdoer. *Id.* at 112.

Obviously, *Wellington* offers support for Stencel's claim. However, its rationale conflicts with the other cases we have already discussed. The basis for potential recovery rested on simple "tort indemnity," devoid of any implied contractual or quasicontractual overtones. As our prior discussion indicates, this form of indemnity requires some form of tort liability to the injured person by the party sought to be charged as an indemnitor, and several cases, as previously discussed, hold that *Feres* precludes any such

tort liability on the part of the Government. *Wellington* does not mention this circuit's decision in *Maddux* v. *Cox, supra,* the two Ninth Circuit cases cited therein, or the Fifth Circuit's opinion in *Certain Underwriters at Lloyd's* v. *United States, supra.* Although these four cases technically may have turned upon particular state law, in fact they looked to and construed the general common law followed by most states and which law also would usually apply in an admiralty setting. *Cf. Hess* v. *United States,* 361 U.S. 214 (1960). *Wellington* cannot be regarded as turning upon a contrary special rule. Thus, the rationale of the court is inconsistent with the cases we have previously discussed.

Nor does *Wellington* offer much guidance on the availability of a third-party military-related indemnity claim. The court states that the *Feres* holding is not a *per se* bar to such relief. However, it does not further discuss the issue. Perhaps the best explanation of *Wellington* is that the tort occurred on a navigable waterway under admiralty law and that the primary claim for indemnity was based upon a quasicontractual duty to indemnify which is liberally inferred in admiralty law. Such claims have been allowed by the Supreme Court in admiralty cases such as *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S.S. Co., Inc., supra,* and its progeny, and the Supreme Court's ambiguous disposition of *Treadwell Construction Co.* v. *United States, supra, see* note 9, *supra,* was taken by the *Wellington* court to require adherence to the *Ryan* rule. Certainly this view is supported language of the *Wellington* decision.

In any event, *Wellington* offers us no persuasive analysis of the relationship of the *Feres* rationale to the scope of the Government's waiver of immunity under the FTCA.

Unfortunately, this is equally true of the other circuit court opinions we have discussed, including our own in *Maddux* v. *Cox, supra.* No generally accepted and satisfactory consensus exists as to the reach of the *Feres* doctrine in cases in which a private tortfeasor seeks indemnity against the Government for reimbursement of claims paid to an injured military, on-duty serviceman.

While we agree that the *Feres* opinion itself was not intended to decide the rights of third parties seeking indemnity, we think that the Court's emphasis on the unique nature of the military relationship is crucial to the instant cases. We cannot agree with Stencel that the general language of the FTCA was intended to subject the conduct of the United States in equipping, training, and utilizing the Armed Forces to the varying standards of conduct and concommitant obligations and liabilities imposed by the states upon private citizens. The involvement of the military relationship in this case distinguishes this case from those involving workmen's compensation acts such as the Longshoreman's Act considered in *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S.S. Co.,* 315 U.S. 124 (1956), and its progeny, and the Federal Employees' Compensation Act considered in *Weyerhaeuser, supra,*[11] and in *Wallenius Bremen* v. *United States,* 409 F.2d 994 (4th Cir. 1969).

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[11] In *Weyerhaeuser S.S. Co.* v. *United States, supra,* the federal civilian employee's injuries occurred as the result of a collision between a private vessel and an Army dredge. Both vessels were at fault. The federal employee recovered against the private vessel which then successfully sought partial indemnity from the United States. The Court's reasoning in granting 50 percent indemnity is inapposite to the circumstances of the present case for the following reasons:

1) There is no good reason in normal circumstances for excusing a military vessel from obeying nationwide (and, to a large extent,

To allow Stencel to recover in this case would require us to "visit the Government with novel and unprecedented liabilities." *Feres* v. *United States, supra,* 340 U.S. at 142. The FTCA neither permits nor compels us to effect such a "radical departure" from the established rule of law that federal military and contractual relationships are not to be governed by state law.[12] Therefore, the order of the district court dismissing Stencel's cross-claim is affirmed.

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worldwide) uniform maritime "rules of the road" when operating in navigable waters.

2) The action appeared to be directly authorized by the Public Vessels Act, 43 Stat. 112, 46 U.S.C. §781 *et seq.*, which " 'was intended to impose on the United States the same liability * * * as is imposed by admiralty law on the private shipowner * * *.' " 372 U.S. at 600.

3) The Government's liability for half the damages was based upon "a rule of admiralty law which, for more than 100 years, has governed with * * * clarity the correlative rights and duties of two shipowners whose vessels [were] both at fault." *Id.* at 603. This rule was well known to Congress when the Public Vessels Act was adopted.

4) The Federal Employees' Compensation Act expressly provided for recapture by the United States of FECA benefits paid to the employee, thus avoiding any possibility of a double recovery. *Id.* at 598 n.2.

We note that the Supreme Court has now modified admiralty's rigid equal division of damages rule, continuing the strong current trend toward apportionment of damages according to the relative fault of the parties. *See United States* v. *Reliable Transfer Co.,* 421 U.S. 397, 406-07 (1975). However, this does not affect our analysis of the indemnity aspect of *Weyerhaeuser.*

[12] Stencel emphasizes the unfairness of requiring it to risk bearing the entire burden of liability for injuries for which it may have been partially, secondarily, or passively responsible. It observes that indemnity and contribution are equitable remedies evolved by the courts to ameliorate this injustice, either by distributing the loss equally through contribution or by shifting the enire burden onto the party primarily responsible through indemnity. *See* Prosser, *Law of Torts,* 3d Ed. §278. There is some force to this argument.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

In *Feres,* the Supreme Court reasoned that the simple, certain, and uniform system of military compensation to injured servicemen was intended to stand in lieu of governmental tort liability in cases where the Government might be considered at fault. We note that the District of Columbia Circuit has adopted a novel approach in response to a similar "unfairness" argument in an action for contribution. That court held that the position of a beneficiary of such a compensation scheme is analogous to that of a plaintiff who has allowed one joint tortfeasor to have "bought his peace," and that the remaining defendant is entitled to have the damages reduced by half. *Murray* v. *United States,* 405 F.2d 1361, 1365 (D.C. Cir. 1968); *Martello* v. *Hawley,* 300 F.2d 721 (D.C. Cir. 1962); *see Dawson* v. *Contractors Corp.,* 467 F.2d 727 (D.C. Cir. 1972); *cf. United States* v. *Brown,* 348 U.S. 110, 111 n.1 (1954).

Order Granting Certiorari

SUPREME COURT OF THE UNITED STATES

No. 76-321

STENCEL AERO ENGINEERING CORPORATION,

Petitioner,

v.

UNITED STATES

ORDER ALLOWING CERTIORARI. Filed November 15, 1976

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted.

Affidavit of Service

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.:*

I, Michael J. Holland, being over the age of 18 years, an associate attorney employed by the Firm of Condon & Forsyth, hereby certify that I have this 20th day of December, 1976, served three copies of the foregoing Appendix upon Respondent United States of America, by mailing copies thereof to its attorneys of record in sealed envelopes, with air mail postage prepaid, deposited in The United States General Post Office, located at Rockefeller Center, New York, New York 10020 and addressed as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

.....

MICHAEL J. HOLLAND

Sworn to before me this
20th day of December, 1976

.....

LAWRENCE MENTZ
Notary Public